# MAJOR COURT DECISIONS OF 1996

The following is a compendium of major communications law decisions handed down by courts of the United States in 1996.

## ADMINISTRATIVE LAW ISSUES

***DeLorme Publishing Co., Inc. v. National Oceanic and Atmospheric Administration of the U.S. Department of Commerce***
917 F. Supp. 867 (D.Me. 1996)

*Issue:*

Whether or not there is an exception to the requirements under the Freedom of Information Act ("FOIA") for documents, in this case, National Oceanic and Atmospheric Administration ("NOAA") electronic raster compilations of nautical charts, when such government documents are created in cooperation with, and in anticipation of and during, a cooperative research and development agreement ("CRADA"), entered into with a private business.

*Holding:*

The court held that NOAA's raster compilations, when created in anticipation of entering into a CRADA, were protected from disclosure for up to five years under the Federal Technology Transfer Act ("FTTA"); that said compilations were not subject to mandatory and permanent protection under FTTA; that any electronic compilations created after NOAA entered into the CRADA were subject to a five year protection; and that, under FOIA, NOAA did not improperly withhold said compilations from plaintiff; while said compilations could not be protected indefinitely under FOIA from disclosure, as they were not records related solely to internal personnel rules and practices of NOAA.

*Discussion:*

The court looked at FOIA, and the various exemptions therein, and found that the court would defer to the administrative agency's interpretations depending upon the extent to which the matters in issue depend particularly upon the subject agency's area of expertise. The court further reviewed the FTTA's statement of purpose and found that it was enacted to improve the interaction and competitiveness of the government and private parties, and to create "'a broad range of cooperative research and development arrangements . . . between the laboratory mission and . . . private sector organizations.'" *Id.* at S. REP. No. 283, 99th Cong., 1, 10 (1986). As a result, the court discussed the fact that there were two types of protection available to prevent otherwise mandatory disclosure of commercial information. First, is information that is obtained through the conduct of research from a non-Federal party participating in a CRADA; and the second, is a five year protection afforded agencies if the information in question is resultant from research and development activities and would be information that would be privileged or confidential if obtained from a non-Federal party participating in a CRADA. The resulting rule found that commercial information is 'confidential' for purposes of the exemption if disclosure of such information would likely either, (1) impair the Government's ability to obtain necessary information at a future point in time; or (2) cause substantial harm to the competitive position of the entity form which such information was obtained.

***McCaw Communications, Inc. v. Clark***
679 So.2d 1177 (Fla. 1996)

*Issue:*

Whether the Florida Commission's revisiting of the regulation of interconnection rates, which resulted in an order severing the link between interconnection rates and access charges, violated the doctrine of administrative finality and was supported by sufficient evidence.

*Holding:*

The re-evaluation of interconnection rates was affirmed by the court as valid and supported by ample evidence.

*Discussion:*

The court concluded that extensive evidence existed to support the Commission's decision. In regard to administrative finality, the court held that this type of issue was one that must be continually re-evaluated, based on shifting circumstances and the passage of time.

***United States v. Western Electric Company, Inc.***
2 Comm. Reg. (P&F) 1388 (1996)

*Issue:*

Whether the regional Bell operating companies (RBOCs) should be granted a court order to require the return of numerous documents obtained by the DOJ rather than allow the documents to be transferred for use by the FCC in proceedings authorized by Congress.

*Holding:*

The court denied the RBOCs request for return of the documents since requiring the FCC to collect documents as authorized by Congress which are already held by the DOJ would simply be duplicative and would "make no sense."

*Discussion:*

The court rested its holding on the fact that Congress through the Telecommunications Act of 1996 implicitly believed that the FCC with its newly-acquired quasi-judicial role would receive the DOJ's full cooperation, which included access to information needed by the FCC to carry out its new responsibilities. The court held that the FCC may obtain from the DOJ and use the documents needed to implement Section 271 or other sections of the Telecomm Act that require the FCC to conduct a competitive analysis. In holding as it did, however, the court found that the DOJ could still use the documents in question if they relate to the purpose for which they were initially obtained. The DOJ may further use the documents in its role as an advisor to the FCC. However, the documents may not be used to investigate wholly unrelated activity that might be in violation of other antitrust laws, unless otherwise authorized by law.

## ANTITRUST ISSUES

***Cyber Promotions, Inc. v. America Online, Inc.***
948 F. Supp. 456 (E.D. Penn. 1996)

*Issue:*

Whether America Online's ("AOL") scheme which allows its customers to instruct AOL to block unsolicited electronic mail violates is sufficient evidence to substantiate a temporary restraining order under the Sherman Act's essential facilities doctrine.

*Holding:*

The temporary restraining order was denied since there is little likelihood that Cyber Promotions ("Cyber") would be able to establish the necessary elements to a Section 2 monopoly claim, since, under the essential facilities doctrine, AOL is not denying Cyber access to the AOL customers nor has Cyber established that AOL has monopoly power or, if so, that it was willfully attained.

*Discussion:*

AOL is a private online company that provides Internet access and services, including electronic mail ("e-mail") to its subscribers for a fee. All e-mail between the Internet and AOL customers and mail between AOL customers required the use of AOL's hardware and software, which, while expandable, has a finite capacity. Cyber provided e-mail advertising services for third parties by sending e-mail to a plethora of Internet e-mail addresses, which included AOL subscribers. Over a three-month period, AOL's computers processed over one million unsolicited e-mail messages per day from Cyber.

Two days after the district court ruled that Cyber had no First Amendment rights to send unsolicited e-mail advertisements over the Internet to AOL subscribers, Cyber alleged that AOL's blocking scheme (i.e., AOL may block unsolicited messages to its customers if the customers so choose) violated Section 2 of the Sherman Act because AOL was able to obtain a monopoly in the direct marketing advertising area and sought a temporary restraining order.

The same district court held that there is little likelihood that Cyber will be able to establish the necessary elements to a Section 2 monopoly claim since, under the essential facilities doctrine, AOL is not denying Cyber access to the AOL customers nor has Cyber established that AOL has monopoly power in the relevant market. Additionally, the court held that even if Cyber could show AOL had monopoly power, it could not show that AOL willfully acquired that power. Thus, the court denied the motion for a temporary restraining order. However, Cyber was allowed to amend its complaint to include the antitrust claim.

***Discon, Inc. v. NYNEX Corporation***
93 F.3d 1055 (2d Cir. 1996)

*Issue:*

Whether Discon's pleadings alleged the necessary facts and components to substantiate Sections 1 and 2 Sherman Act violations and various Racketeer Influenced and Corrupt Organizations Act ("RICO") violations.

*Holding:*

Under Section 1, the pleadings established a boycott claim since NYNEX failed to state a procompetitive rationale for discriminating in favor of one supplier over another. Under Section 2, the pleadings fail to support a monopolization or attempt to monopolization, since NYNEX does not possess monopoly power in the relevant removal service market. The pleadings established a conspiracy to monopolize since Discon alleged that NYNEX agreed to assist in AT&T's attempt to monopolize the relevant market. Finally, the three RICO claims were dismissed since Discon failed to plead the necessary injury or NYNEX enjoyed an agency relationship with its subsidiaries.

*Discussion:*

Discon, a telephone removal service, (i.e., remover, salvager, and disposer of obsolete telephone equipment), was formed in response to the requirement that the Bell Operating Companies (BOCs) were required to purchase removal service from a competitive field of suppliers. Discon and an AT&T subsidiary both competed in the New York state area. NYNEX, a BOC successor in the northeast, wholly owns subsidiary New York Telephone ("NYTel"), a dominant purchaser of removal services in the New York area, and Material Enterprises ("MECo"), a purchasing agent, and other related companies. Previously, NYNEX used a complicated corporate structure to subvert New York's regulatory scheme, since only NYTel was subject to state regulation. After a long legal battle, the FCC forced NYNEX to return over $35 million in overcharges to its customers.

Reversing the district court, which dismissed Discon's complaint for failure to state a claim, the Second Circuit found that Discon successfully alleged a cause of action under the rule of reason as applied to boycotts since NYNEX failed to state a pro-competitive rationale for discriminating in favor of one supplier over another. The court affirmed the district courts decision to dismiss the monopolization claim since NYNEX did not possess monopoly power in the relevant removal service market. Additionally, for the same reason, the court dismissed the attempted monopolization claim since there was no probability of NYNEX's success as NYNEX did not have relevant market power. However, the court sustained Discon's conspiracy to monopolize claim because the court found specific intent in that NYNEX agreed to assist in AT&T's attempt to monopolize the relevant market. The court affirmed the district court's holding to dismiss the three RICO violations because either Discon failed to plead the necessary injury or NYNEX enjoyed an agency relationship with its subsidiaries.

***U.S. West, Inc., v. Time Warner, Inc.***
1996 WL 307445 (Del.Ch. 1996)

*Issue:*

Whether the exceptions contained in a modification agreement amend the particular section of an original limited partnership agreement so as to prohibit Time Warner, Inc. (TWI) from acquiring controlling interest in Turner Broadcasting System, Inc. (TBS).

*Holding:*

Applying traditional means of contract construction, the modification in question does not serve to prohibit TWI from acquiring controlling interest in TBS.

*Discussion:*

This dispute arose out of the creation of a limited partnership, Time Warner Entertainment (TWE), which was later modified to allow a new limited partner, U.S. West, Inc. (U.S. West), to join. At issue is the acquisition of controlling interest in TBS, a competitor of U.S. West, by another partner in the limited partnership, TWI. U.S. West brought suit to obtain an injunction against this acquisition.

Three theories were put forth by U.S. West in its complaint. The court rejected theories contending that TWI breached its fiduciary duty to the limited partnership and that TWI was fraudulent in concealing a relevant memorandum. The court only considered the theory that the 1993 Admission Agreement served to prohibit such an acquisition. In addressing the claim, the court had to determine whether TWI or U.S .West had the better interpretation of the Admission Agreement and disputed Section 5.5. The court concluded that neither interpretation was significantly better than the other, but that TWI's interpretation was more likely to be fair than that of U.S. West. The court utilized the parole evidence rule to look at the intent of the parties and concluded that TWI would not be prohibited from acquiring controlling interest in TBS.

Furthermore, the court claimed that U.S. West knew or should have known of TWI's intent given the existence of the initial partnership agreement, that TWI told U.S. West that it intended to maintain its flexibility regarding TBS, that TWI told U.S. West if TBS was acquired through TWE it would first be made available to the partners and, finally, that U.S. West never negotiated for such a right in the 1992-1993 negotiations of the Admission Agreement.

## BROADCAST ISSUES

***Berger v. CNN, Inc.***
24 Media L. Rep. (BNA) 1757 (Mo. 1996)

*Issue:*

Whether CNN violated the plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures by filming and broadcasting the execution of a search warrant on plaintiff's ranch.

*Holding:*

The court granted CNN summary judgment as the Fourth Amendment claim was collaterally estopped because the criminal court upheld the search.

*Discussion:*

The Montana Fish and Game Service executed a valid search warrant pursuant to an investigation into whether the plaintiff used poisons to kill predators on his ranch, including eagles. When federal and state officials entered the plaintiff's property, they were accompanied by a CNN crew, which filmed the search warrant execution.

In the criminal case proceeding this civil suit, the court held that evidence obtained during the search was admissible and that the filming by the CNN crew did not violate the Fourth Amendment. In this case, the court ruled that the holding in the criminal court collaterally estops a civil court from making the same Fourth Amendment determination. Additionally, the court found that CNN had not acted under the color of federal law since their presence during the search furthered its own interests and therefore could not be found liable for violating the plaintiff's Fourth Amendment rights.

***JB Pictures, Inc. v. U.S. Department of Defense***
86 F.3d 236 (D.C. Cir. 1996)

*Issue:*

Whether a new Department of Defense policy on the unloading of caskets during ceremonies honoring military members' deaths violates the press' First Amendment right of access.

*Holding:*

The court upheld the Department of Defense's new policy under the First Amendment since the government had interests at stake and the press still had right to access with consent by the deceased's family.

*Discussion:*

Prior to the Persion Gulf War, ceremonies honoring those who died at war were open to the public and conducted only at Dover Air Force Base. The Department of Defense instituted a new policy which allowed family members a veto power over press coverage and also moved the ceremonies to the military member's duty or home station, rather than Dover.

The court noted that the press has a qualified right of access under the First Amendment. Further, when events are typically open to the public, the press has a constitutional right to access unless "the denial of access is necessitated by an 'overriding' governmental interest and is narrowly tailored to serve that interest." The court found two reasons for upholding the new policy: (1) reduce hardship on the families and friends of the dead who may feel obliged to attend ceremonies at Dover and (2) protect the privacy of the families and friends in the unloading of caskets. Moreover, the press may cover the ceremonies if the family consents. Therefore, the press still enjoys "'substantial,' though not complete" access to the unloading of the caskets.

## CIVIL PROCEDURE

### *In re Comcast Cellular Telecommunications Litigation*
949 F.Supp 1193 (E.D. Pa. 1996)

*Issue:*

Whether the Telecommunications Act of 1996 allows federal courts to take jurisdiction over claims brought solely under state law.

*Holding:*

If the true nature of a complaint filed solely in state court involves causes of action that would have been available under the Telecomm Act, federal courts have subject matter jurisdiction and it is proper for the complaint to be removed to be federal court.

*Discussion:*

Customers of Comcast Cellular Telecommunications brought a class action suit against the company in state court alleging inadequate disclosure of company billing policies, breach of contract, breach of implied duty of good faith and fair dealing, and unjust enrichment and restitution. The court held some of these claims directly challenged the rates charged for each call and, as such, state regulation of these practices was preempted by the Telecomm Act. For purposes of federal preemption, the Telecomm Act governs when a cause of action arises in direct relation to a provision of interstate communications service. In order to be brought in a state court, a cause of action has to be distinguishable from those created under the Telecomm Act. The Savings clause of the Telecomm Act only serves to preserve independent state law causes of action. In this case, several of the claims brought by the plaintiff were indistinguishable from causes of action explicitly created by the terms of the Telecomm Act. The case was rightfully removed from state court to federal court.

### *CompuServe, Inc. v. Patterson*
89 F.3d 1257 (6th Cir. 1996)

*Issue:*

Whether Ohio has personal jurisdiction where CompuServe sought a declaration in Ohio that it had not infringed any common law trademarks of defendant, a Texan, and that it was not otherwise guilty of unfair or deceptive trade practices.

*Holding:*

The defendant had sufficient contacts with Ohio for Ohio to exercise personal jurisdiction.

*Discussion:*

The district court held that the electronic links between the defendant, a Texan, and Ohio, where CompuServe is headquartered, were too tenuous to support the exercise of personal jurisdiction. CompuServe appealed the dismissal for lack of personal jurisdiction of its complaint.

The court considered three factors in deciding if the defendant had sufficient contacts with Ohio that the exercise of personal jurisdiction would comport with "traditional notions of fair play and substantial justice." The first factor, purposeful availment, is met when the defendant's contacts with the forum state "proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state," and when the defendant's conduct and connection with the forum state are such that he "should reasonably anticipate being haled into court there." The court determined that the first factor had been satisfied because the defendant subscribed to CompuServe, made a Shareware Registration Agreement, loaded his program onto CompuServe's system for others to use, and was thus on notice that he contracted with an Ohio company. The absence of physical contacts cannot overcome personal jurisdiction if a commercial actor's efforts are 'purposefully directed' toward residents of another state. The quality of the contacts with Ohio and the defendant's deliberate and repeated contacts increased the satisfaction of the factor.

The second factor examines whether the cause of action arose from the defendant's activities in Ohio. Because the defendant's contacts with Ohio were related to the operative facts of the controversy, the action was determined to have arisen from those contacts. Finally, the reasonableness factor was satisfied because the first two factors were met and their satisfaction inferred the existence of the third factor. The court noted that its holding was limited to the facts of the case at bar and should not be applied to other situations that may arise.

***Inset Systems, Inc. v. Instruction Set, Inc.***
937 F. Supp. 161 (D.Conn. 1996)

*Issue:*

Whether the Connecticut long-arm statute, C.G.S. Section 33-411(c) confers jurisdiction over the defendant soliciting over the Internet and whether the statute's jurisdictional reach meets the "minimum contacts" required to satisfy constitutional due process.

*Holding:*

The plaintiff established both that solicitation over the Internet by the defendant within the meaning of the long-arm statute existed so that long-arm jurisdiction was proper, and that the minimum contacts necessary to comply with due process existed.

*Discussion:*

The Connecticut long-arm statute, C.G.S. Section 33-411 (c)(2) states that "Every foreign corporation shall be subject to suit in this state, by a resident of this state . . . on any cause of action arising . . . (2) out of any business solicited in this state . . . if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state . . ." The court concluded that the defendant's advertising via the Internet was solicitation of a sufficiently repetitive nature to satisfy the Connecticut long-arm statute.

In regard to minimum contacts, the basics of the test are that there must a purposeful availment by the defendant of the privilege of conducting activities within the forum state, thus invoking the benefits of its laws. Such minimum contacts must not offend the concept of fair play and substantial justice. The court determined that the defendant had satisfied the minimum contact standard by conducting business in Connecticut on a consistent basis. Further, fair play and substantial justice were met because Massachusetts, defendant's home state, neighbors Connecticut. Moreover, Connecticut had an interest in adjudicating the dispute which involved Connecticut common and statutory law.

In addition, venue is proper where a corporation is subject to personal jurisdiction. Because defendant was subject to personal jurisdiction in Connecticut, for venue purposes, it was considered a resident of Connecticut under 28 U.S.C. § 1391 (b).

## COMMON CARRIER ISSUES

***BellSouth Corporation v. Federal Communications Commission***
96 F.3d 849 (6th Cir. 1996)

*Issue:*

Whether it is necessary or appropriate for the Sixth Circuit Court of Appeals to recall its mandate and vacate structural separation requirements for provision of cellular telephone service by certain telephone operating companies, issued on November 9, 1995, in *Cincinnati Bell Telephone Company v. FCC,* 69 F.3d 752.

*Holding:*

Motion denied. The court refused to recall its mandate or to vacate the FCC's cellular structural separation rule.

*Discussion:*

The court concluded that the power to recall a mandate should be used "sparingly." The court noted that fraud upon the court, clerical mistakes or clarification of an outstanding mandate have been sufficient grounds for recalling a mandate. To recall a mandate, the movant must demonstrate "good cause for that action through a showing of exceptional circumstances" which must be of a sufficient nature to override the strong public policy that there be finality in litigation. The court reviewed whether the 'exceptional circumstances' that were cited by the movant were of sufficient nature to allow for recall of the mandate, but found that the harm to BellSouth, FCC delay in acting upon the mandate, was insufficient for the court to exercise its recall power.

***Birnbaum v. Sprint Communications Company***
1996 U.S. Dist. LEXIS 17389 (E.D. N.Y. 1996)

*Issue:*

Whether Sprint followed the proper agency procedures and regulations when it amended its FCC tariff.

*Holding:*

Sprint's amended tariff followed the necessary tariff-filing requirements and as such, the court granted Sprint's motion for judgment on the pleadings.

*Discussion:*

The filed rate doctrine established that rates once approved are pre se reasonable and unassailable. The court asserted that a subscriber must be conscious of the fact that a particular filed rate is subject to change and must conform accordingly. Courts must respect the agency's determination and therefore cannot grant the relief which plaintiff sought as it directly implicates the filed rate doctrine.

***Iowa Utilities Board. v. Federal Communications Commission***
4 Comm. Reg. (P&F) 1360 (8th Cir. 1996)

*Issue:*

Whether or not the petitioners are entitled to a stay.

*Holding:*

The court decided to stay the operation and effect of the pricing provisions and 'pick and choose' rules contained in the FCC's First Report and Order, pending the court's final determination of the issues raised by the petitioners.

*Discussion:*

This litigation rises from the FCC's First Report and Order implementing the local competition provisions of the Telecommunications Act of 1996. Congress intended for the Act to break the monopolistic structure that previously existed in local telephone service markets by permitting non-incumbent local service providers into the market. A major part of this 'opening of the market' is the Act's requirement that the incumbent providers privately negotiate in good faith with other carriers, per Sections 251(c)(1), 252(a).

The FCC promulgated the Total Element Long-run Incremental Cost (TELRIC) method to calculate the costs that an incumbent LEC incurs in making its equipment available to its competitors. As a result, the incumbent LECs brought the present action by arguing that the FCC overstepped its authority in that TELRIC undercalculates the costs incurred by the incumbent LECs.

Furthermore, some of the petitioners sought a stay as to the FCC's "pick and choose" rule, which requires LECs to make any of its equipment contained in an approved agreement to which another carrier is a party available to any other carrier upon the same terms and conditions.

The court used the four-step test denoted in *Arkansas Peace Center v. Department of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993), *cert denied*, 114

S.Ct. 1397 (1994), which resulted in the above holding. These four elements include: (1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

The court addressed each of these four items and found, *inter alia,* that the state commissions, not the FCC, were authorized by Congress to establish pricing methods and standards. Furthermore, the court found that TELRIC and the pick and choose methods would impose substantial economic harm and losses on many incumbent LECs, which harm would be 'unrecoverable,' thus qualifying it as irreparable harm.

## COPYRIGHT ISSUES

### *The Scientist, Inc. v. Lindsey and Bioresearch*

1996 WL 278778 (E.D. Pa 1996)

*Issue:*

Whether specific features in *The Scientist* contain the requisite originality to confer copyright protection so that the defendants' reprinting of the features provide a basis for a copyright infringement action.

*Holding:*

The defendants' motion to dismiss the copyright count for failure to state a claim failed because the complaint clearly alleged that the features were original. The defendants' motion and plaintiff's cross-motion for summary judgment failed because material issues of fact with regard to the originality of the features remain.

*Discussion:*

The plaintiff publishes a biweekly newspaper, *The Scientist,* which prints articles and editorials about science news and research. *The Scientist* employed the defendant for approximately two years, after which the defendant began to publish his own monthly newsletter, *Bioresearch Product News.*

The plaintiff alleged that *Bioresearch Product News* contained product summaries and photographs that the defendant took directly from *The Scientist* via a scanning mechanism and mechanical retyping. The defendant did not deny copying the information from *The Scientist,* but contended that none of the information contained any original thought or expression of the plaintiff and, therefore, that copying the features cannot support an action for copyright infringement.

To succeed on a copyright infringement claim, the court stated that the plaintiff must establish ownership of a valid copyright and that the defendant copied elements of the copyrighted work that were original. The defendants in their motion contended that the plaintiff failed to allege that materials appearing in *Bioresearch Product News* were original. The court concluded that the plaintiff repeatedly stated in its complaint that the features at issue involve originality and creativity. Hence, such statements suffice to defeat defendants' motion to dismiss the copyright count for failure to state a claim.

In assessing defendants' motion for summary judgment, the court held that none of the evidence submitted, considered in the light most favorable to the plaintiff, would prevent a reasonable fact finder from determining that the features at issue represent original material. Furthermore, in assessing plaintiff's cross-motion for summary judgment, the court decided that none of the evidence submitted, considered in a light most favorable to the defendants, would hinder a reasonable fact finder from deciding that the features in question involve no originality. Thus, all motions were denied.

## CRYPTOLOGY ISSUES

### *Bernstein v. U. S. Department of State*

945 F. Supp. 1279 (N.D. Ca. 1996)

*Issue:*

Whether export licensing controls on cryptographic software, under the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR), violate the First Amendment.

*Holding:*

The court held that (1) licensing requirements for speech relating to encryption of computer software constituted unlawful prior restraint; (2) definitions of terms in ITAR relating to export of items are not vague; and (3) exemptions from the term "technical data" for academic items were impermissibly vague.

*Discussion:*

At the time this action was filed, plaintiff was a PhD candidate in mathematics at the University of California, at Berkeley, working in the area of cryptography. While a graduate student, plaintiff developed an encryption algorithm.

AECA authorizes the president of the United States to control the import and export of defense articles and defense services by designating these items to the United States Munitions List (USML). Once on this list, a defense article or service requires a license as provided for in ITAR before it can be exported or imported. Cryptographic systems, equipment, modules etc., are listed on the USML. Technical data is defined under the ITAR in relation to defense articles, but it is also defined as a defense article when covered by the USML. Its definition includes software relating to defense articles, including, *inter alia,* algorithms and operating systems.

The plaintiff sought to publish his ideas on cryptography and averred that he is not permitted to teach his algorithm, discuss it at academic conferences, or publish it without a license. The plaintiff argued that the licensing scheme under the ITAR imposes an unconstitutional prior restraint upon cryptographic speech, regardless of whether the speech is defined as a defense article or technical data. The defendants asserted that ITAR, in regulating cryptographic software, is content neutral and survived intermediate scrutiny under the First Amendment. Furthermore, the defendants asserted that the technical data provisions do not regulate scientific or academic speech and, hence, do not act as a prior restraint on the speech.

The court concluded that computer source code is entitled to First Amendment protection and that the ITAR scheme, which places no limits on the discretion of the licenser and no controls to alleviate the danger of arbitrary or discriminatory licensing decisions, acts as a prior restraint in violation of the First Amendment. The provision neither provides a time limit on the licensing decision, nor allows for prompt judicial review. Moreover, the fact that the USML regulates encryption in the interest of national security does not alone justify a prior restraint. Further, regulations subjecting technical data to licensing requirements under AECA are unenforceable to the extent that they encompass items relating to cryptography of computer programs because the provision imposing licensing requirements upon export of computer source code relating to encryption of computer programs is unlawful prior restraint, in violation of the First Amendment.

The plaintiff further argued that the ITAR's definition of defense articles, defense services, and technical data are impermissibly vague. In determining that these definitions are not vague, the court instructed the defendants to remove phrases pertaining to technical data from the definition of defense article.

The plaintiff's final argument was that the exemptions to the definition of technical data were vague as they pertain to the exception for academic items. The court agreed with the plaintiff's characterization of the exemptions and ruled that scientists would have difficulty discerning whether their work was a defense article or was an exemption under ITAR. As a result, in the field of applied science, teachings at universities may overlap with government regulations. *See also,* Bernstein v. U.S. Dept. of State, 922 F.Supp. 1426 (N.D. Ca. 1996).

### *Karn v. U.S. Department of State*
925 F. Supp. 1 (D.C. Cir. 1996)

*Issue:*

Whether the State Department's designation of a computer diskette containing cryptographic algorithms as a "defense article" for purposes of the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR), which subjected the disk to export controls, was subject to judicial review; whether the export limitation under AECA and ITAR violated the plaintiff's right to free speech under the First Amendment.

*Holding:*

The State Department's designation of the diskette as a defense article was subject to judicial review; the export limitation did not violate the plaintiff's right to free speech.

*Discussion:*

The case arises out of the State Department's designation of the plaintiff's computer diskette as a "defense article" pursuant to AECA and ITAR. The plaintiff alleged that the State Department's designation of the diskette as a "defense article" was arbitrary and capricious in violation of the Administrative Procedure Act (APA). The defendants moved to dismiss the plaintiff's APA challenge based on a provision in the AECA precluding judicial review of the designation of items as defense articles subject to the AECA.

The court dismissed the plaintiff's APA challenge to the defendant's designation since Section 2778(h) of the AECA bars judicial review of the president's or the secretary of state's designation of items as defense articles. The court noted the legislative history of this provision, which indicated that AECA was enacted to allow the executive branch to control the export and import of certain items to further the security and foreign policy of the United States. The plaintiff further argued that the defendants' regulation of the diskette constituted a restraint on free speech in violation of First Amendment rights, since the source codes on the diskette are comprehensible when viewed on a personal computer.

The court dismissed the plaintiff's argument and ruled that the government regulation at issue is content neutral. The court recognized that the government regulation was not based on content of the source codes, but rather based on the belief that the combination of encryption source code on machine readable media will facilitate encoding of the communications by foreign intelligence sources.

## FIRST AMENDMENT ISSUES

### *44 Liquormart, Inc. v. Rhode Island*
116 S. Ct. 1495 (1996)

*Issue:*

Whether a Rhode Island statute completely prohibiting advertisement of liquor prices, except at the place of sale, violates the First Amendment; whether a States' power to prohibit commerce in, or the use of, alcoholic beverages pursuant to the Twenty-First Amendment qualifies the States' prohibition of liquor advertising.

*Holding:*

The Rhode Island statute prohibiting the advertisement of liquor prices abridges speech in violation of the First Amendment. The Twenty-First Amendment does not qualify the unconstitutional ban by the State.

*Discussion:*

State-imposed restrictions on commercial speech that is false or misleading are traditionally analyzed under intermediate scrutiny. However, when a state entirely prohibits commercial speech that is neither false nor misleading, there is less reason to depart from the rigorous review that is usually demanded under the First Amendment.

Rhode Island's restriction against all liquor price advertising, except at the place of sale, is a blanket prohibition against truthful and nonmisleading commercial speech about a lawful product. The Court found that this blanket prohibition did not directly advance the States' purported substantial interest in promoting temperance and, therefore, served an end that was not related to the protection of customers.

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The following two cases involve challenges to the constitutionality of the Communications Decency Act ("CDA"), which was amended to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56 (to be codified at 47 U.S.C. § 223). The congressional intent of the CDA is to protect minors from access and exposure to obscene, indecent, sexually explicit, or patently offensive material.

### *American Civil Liberties Union v. Reno*
929 F. Supp. 824 (E.D.Pa. 1996).

*Issue:*

Whether the Communications Decency Act of 1996 ("CDA"), which prohibits the knowing transmission of indecent material to a minor and the display of and access to sexually explicit material on the Internet, chills protective indecent speech and, therefore, violates the First Amendment.

*Holding:*

The CDA is unconstitutional on its face because it is not narrowly-tailored to achieve the goal of preventing the exposure of indecent material to children. The CDA is impermissibly vague and violates both the First and Fifth Amendments, overbroad in that it chills protective indecent speech, even if for minimal periods of time. Furthermore, the affirmative defenses in the CDA are not sufficient to protect speakers from criminal liability given the limitations in technology.

*Discussion:*

ACLU, *inter alia,* challenged two provisions of the CDA, Sections 223(a) and 223(d), which impose criminal penalties on any person who knowingly initiates the transmission of indecent or obscene material to a minor and uses an interactive computer service to send or display, in any manner, sexually explicit material, respectively. ACLU asserted that the CDA was unconstitutionally vague and overbroad.

The court reviewed the asserted substantial governmental interest in shielding minors from access to sexually explicit or indecent materials and was concerned that the potential harm to children was not evident when such materials could be informative, educational or important subject matter to older children. The broad prohibition of such material, irregardless of the context, was a consideration in the court's vagueness review. Nonetheless, the court found that there is a compelling governmental interest in protecting minors from some of the indecent material on the Internet, but the court found that the CDA is not narrowly-tailored to meet that objective.

Although the government represented that it would only enforce violations of the CDA for unprotected pornographic material, the court found that this representation was not consistent with statutory language and did not prevent an ambitious federal prosecutor from vigorous prosecution at another time. The court held that First Amendment protection should not be left to the judgment of prosecutors.

The court also held that the "safe harbor" provisions that provide affirmative defenses upon prosecution were not sufficient because screening technology was not yet fully developed. Given the limited availability of technology, most adults will not be able to avail themselves of the defenses and to avoid the threat of criminal liability, a speaker would have to refrain from using any type of sexually explicit or indecent speech.

The motion for a preliminary injunction was granted because the ACLU established that the injunction was in the public interest and the ACLU was likely to prevail on the merits and would suffer irreparable harm.

***Shea v. Reno***
930 F. Supp. 916 (S.D.N.Y. 1996).

*Issue:*

Whether the Communications Decency Act of 1996 (CDA), which prohibits the display of and access to indecent or sexually explicit material on the Internet, chills protective speech and, therefore, violates the First Amendment; whether the two affirmative defenses in the CDA serve to shield speakers from criminal liability and save the statute from being overbroad.

*Holding:*

The CDA is unconstitutional on its face because it is not narrowly-tailored to achieve the goal of preventing the exposure of indecent material to children. Although the CDA is not impermissibly vague, it is overbroad in that it chills protective indecent speech, even if for minimal periods of time. Furthermore, the affirmative defenses in the CDA are not sufficient to protect speakers from criminal liability given the limitations in technology.

*Discussion:*

Section 223(d) criminalizes the use or display of any sexually explicit material that is patently offensive by contemporary community standards on an interactive computer service in a manner that is available to a person under eighteen years of age. Content-based regulation of speech is subject to strict scrutiny, the highest judicial standard of review. Therefore, to be constitutional, a statute must be supported by a compelling governmental interest and be narrowly-tailored to achieve that interest.

Joe Shea, on behalf of the American Reporter, an electronic newspaper, challenged the constitutionality of the CDA on several grounds: (1) the statute is unconstitutionally vague in violation of the First and Fifth Amendments; (2) the statute is overbroad as a complete ban on constitutionally protected adult indecent speech; and (3) the affirmative defenses in the statute do not save the statute from being overbroad.

The court held that Congress' incorporation of the FCC's indecency standard upheld in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), did not make the statute unconstitutionally vague. Furthermore, the court disagreed with Shea's claim that the CDA's requirement that there be an assessment of a work's context is highly unpredictable and offensive. There is sufficient case precedent for prosecutors to delineate the contours of the indecency standard and its application to interactive services. The court also held that the inability of an Internet content provider to assess what community standards would govern transmission was not a novel problem, but one in which the burden is on the content provider to be informed about the standards of the various communities in which its material is to be distributed.

The Shea court distinguished its holding from the Third Circuit's holding that the CDA was unconstitutionally vague because the CDA left open the possibility for arbitrary enforcement. *See American Civil Liberties Union v. Reno,* 929 F. Supp. 824 (E.D.Pa.1996). There were no such representations by the government in this case, therefore enforcement was not an issue.

However, the court did find that the statute was overbroad because adult speakers do not have a way of transmitting content with certainty that it would not reach minors. Therefore, the CDA is not narrowly-tailored. Fear of criminal prosecution would necessitate that an adult speaker refrain totally from using constitutionally protected speech.

The court held that the government did not meet its burden in proving that the statutory defenses preserved an adult Internet speaker's ability to engage in constitutionally protected indecent speech. The court recognized that the use of adult verification services would be an undue burden and costly to content providers and that access to new screening technology was not dependent on the actions of third parties who were not obligated or statutorily mandated to provide such technology. Given the limited availability of screening technology, most adults will not be able to avail themselves of the defenses. To avoid the threat of criminal liability, a speaker would have to refrain from using any type of patently offensive speech.

The court also declined to limit the statute's scope because any limitation to the category of content provider would not be consistent with the congressional intent to apply the CDA's prescriptions to both commercial and non-commercial providers. The motion for a preliminary injunction was granted because the Plaintiff established that he was likely to prevail on the merits and would suffer irreparable harm.

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### *United States v. Thomas*
74 F.3d 701 (6th Cir. 1996)

*Issue:*

Whether defendants' operation of an Amateur Action Computer Bulletin Board System (AABBS), an electronic bulletin board system that operated by using telephones, modems and personal computers to enable members to access pornographic materials on the bulletin board, constituted a violation of 18 U.S.C. §§ 1462 and 1465, federal obscenity laws.

*Holding:*

The convictions and sentences of the defendants were upheld by the Court, which found the operation of the bulletin board to be in violation of the federal obscenity laws.

*Discussion:*

A Tennessee jury convicted the defendants under Sections 1462 and 1465 for distributing obscene material via their electronic bulletin board system (BBS), which was run by the defendants from California. The defendants approved a Tennessee resident to become a member of their BBS and transmitted material deemed obscene under the community standards in Tennessee. The defendants challenged their convictions on grounds including the First Amendment, venue and federal statututory law.

The defendants challenged the community

standard to be applied by the jury in determining whether material is obscene under the second of the three-prong test for obscenity established in *Miller v. California*, 413 U.S. 15 (1973). The defendants objected to the application of the community standard of the receiving community. Rejecting the defendants' argument, the court noted that the standards applied in the trial are those of the district in which the trial takes place and that offenses are properly prosecuted in either the district of dispatch or receipt. The defendants asserted that without a more flexible definition of community, a chill on protected speech will result because BBS operators will not be able to select those who receive the material and will be forced to censor their material in order to comply with diverse community standards. The court declined to reach the question of the necessity to establish a new definition of community because the defendants had in place a method to limit user access in jurisdictions where the community standards would create a greater risk of finding the material obscene. The court noted that if the defendants wished to avoid liability in jurisdictions with different standards, they could have denied membership to persons in those jurisdictions.

The defendants next argued that the district court erred in its instruction to the jury that the prosecution was not required to present expert testimony on the prurient appeal of the materials, required in the second prong of the *Miller* test. The defendants argued that the government is required to present expert testimony when sexually-explicit material is directed at a deviant group. The court found that the instruction was not erroneous. First, the court noted that the Supreme Court has held repeatedly that expert testimony is not necessary to assist a jury in determining the obscenity of material which has been placed into evidence. The traditional use of expert testimony, to assist lay jurors in understanding what they would be unable to understand without the testimony, was not present. Second, the court noted that the Supreme Court has reserved judgment on whether expert testimony is required where the material is directed at a bizarre deviant group, which would render the experience of the jurors inadequate to judge whether the material appeals to prurient interest. Thus, as there is not a per se rule adopted by the Supreme Court or in the jurisdiction to the contrary, the court found the instruction to be proper.

Further, the court rejected Defendants' challenge to venue in the Western District of Tennessee for the counts of the indictment relating to the files which were transmitted to Tennessee. Defendants asserted that they did not cause the files to be transmitted to Tennessee, but that the government agent caused the transmission. To establish a violation of § 1465, the prosecution must prove that a defendant knowingly used a facility or means of interstate commerce for the purpose of distributing obscene materials. The court noted that § 1465 does not require the prosecution to prove that the defendant had specific knowledge of the destination of each transmittal at the time it occurred. Finding venue to be proper, the court noted that the AABBS was set up to provide access to and instant transmission through interstate commerce of files to members in other jurisdictions. The defendants approved AABBS members and distributed materials fully aware of members' home states.

Lastly, the court disagreed with the defendants' contention that § 1465 did not apply because the transmission of the files involved an intangible string of 0's and 1's which became viewable images only after they were decoded by an AABBS member's computer. The court reasoned that the defendants focused on the means of transportation rather than the fact that the transmissions began with computer generated images in California and ended with the same computer-generated images in Tennessee. The court noted that the manner in which the images were transmitted does not affect the ability to see the images on the screen or to print the images.

## SATELLITE ISSUES

### *Advanced Communications Corporation v. FCC*

84 F.3d 1452 (D.C. Cir. 1996)

*Issue:*

Whether the FCC decision denying Advanced Communications Corporation's ("ACC") request for a second four-year extension during which it could begin operating its direct broadcast satellite system was arbitrary and capricious.

*Holding:*

The FCC decision denying ACC's request for an extension was not arbitrary and capricious.

*Discussion:*

The FCC awarded ACC a conditional construction permit to provide direct broadcast satellite ("DBS") service. Under FCC rules, ACC had to satisfy two due diligence requirements: First, it must "begin construction or complete contracting for construction of [its satellite system] within one year of the grant of the construction permit", and second, it must begin operating its system "within six years of the construction permit grant." ACC fulfilled the first requirement, and requested a second four-year extension to satisfy the second requirement. The FCC denied the request, finding that it would not serve the public interest, and declared the ACC's permit null and void.

ACC appealed based on three grounds. First, ACC argued that the FCC's decision was an arbitrary departure from agency precedent. The court found that although the Order departed from precedent, the fact that this was the first time the FCC denied an extension to a DBS permittee does not mean the FCC acted in a manner inconsistent with its precedent. The FCC articulated sufficient distinctions from the other cases where they had granted the extensions.

Second, ACC argued that the FCC failed to provide a reasonable explanation for its decision and the subsequent delay in the initiation of new DBS service. The court stated that while timely initiation of DBS service is one of the FCC's goals, it has never been the sole criterion in determining whether to grant an extension. Rather, the FCC considers the totality of the circumstances – those efforts made and not made by the permittee to comply with the due diligence requirements.

Third, ACC argued that in making its decision, the FCC improperly considered the revenues to be gained from the auction of ACC's orbital slot and channels. The court responded by saying that although the FCC was aware of the expected Federal revenue, it's Order does not base its denial on this expectation, but rather on ACC's failure to achieve any concrete progress towards satisfying the second due diligence requirement.

## TRADEMARK ISSUES

***Holiday Inns, Inc. v. 800 Reservation, Inc.***
86 F.3d 619 (6th Cir. 1996)

*Issue:*

Whether the owner of a 1-800 vanity telephone number, 1-800-HOLIDAY, has trademark rights, under the Lanham Act, in a neighboring 1-800 number, 1-800-H"0"LIDAY, which its customers frequently misdial by accident and are then offered a competing service.

*Holding:*

The plain language of the Lanham Act does not support a finding of trademark infringement since the defendant did not use the Holiday Inn mark or a confusing likeness.

*Discussion:*

800 Reservation, a hotel reservation service company, secured the rights to a 1-800 number that was the frequently mis-dialed Holiday Inns' reservation number. Holiday Inns' vanity number was 1-800-HOLIDAY, while 800 Reservation's number was 1-800-H("0")LIDAY. 800 Reservation discovered that Holiday Inns' customers frequently substituted "zero" for the "O" and began offering hotel reservation service to those Holiday Inns' customers who misdialed. Holiday Inns filed a Lanham Act suit alleging unfair competition and trademark infringement. The district court held that even though 800 Reservation did not violate the "letter" of the Lanham Act, it nevertheless violated the "spirit" of the Act, and therefore permanently enjoined the use by 800 Reservation from using the frequently mis-dialed 1-800 number. The Sixth Circuit reversed.

A prerequisite to a Lanham Act violation is the unauthorized use of a protected mark or the use of a misleading representation of the protected mark. However, the Sixth Circuit held that although Holiday Inns own trademark rights in 1-800-Holiday, it cannot claim such a right in the 1-800-H"0"LIDAY number. Thus, since 800 Reservation neither used the Holiday Inn mark or a confusing likeness, there can be no infringement. The court further determined that "stretching the plain language of the Lanham Act to cover the present dispute is unjustified."

### *Malarkey-Taylor Association, Inc. v. Cellular Telcommunications Industry Association*
929 F. Supp. 473 (D.C. Cir. 1996)

*Issue:*

Whether the Malarkey-Taylor Association (MTA), owner of the "WirelessNOW" mark, should be granted a preliminary injunction based upon trademark infringement and unfair competition for Cellular Telecommunication Industry Association (CTIA) use of its "Go Wireless Now!" mark.

*Holding:*

MTA's application for a preliminary injunction was granted and CTIA was enjoined from using "Go Wireless NOW!"

*Discussion:*

The court based its grant of preliminary injunction in part, on the unusual and distinctive nature of MTA's mark. The court also applied the *Polaroid* Factors in order to determine whether there was a likelihood of confusion by the use of CTIA's mark. The use of the same words and the potential for MTA to "bridge the gap" by offering the same services were relevant factors considered by the court. The existence of actual confusion, although not determinative, was given some weight in the court's analysis. Lastly, the fact that CTIA did not apply for a trademark registration until it was placed on notice by MTA, influenced the court to grant the preliminary injunction.

### *Maritz, Inc. v. Cybergold*
947 F. Supp. 1338 (1996)

*Issue:*

Whether Goldmail mark owner, Maritz, Inc., is entitled to a preliminary injunction against defendant's Internet use of the Cybergold mark under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

*Holding:*

Maritz, Inc. is not entitled to a preliminary injunction because it failed to meet the criteria for an injunction.

*Discussion:*

To grant a preliminary injunction, the court needed to evaluate four considerations. The first consideration, balance of hardships, required the court to balance between the harm to the party seeking an injunction and the injury that granting such injunction would inflict on the other interested parties. The plaintiff argued that the harm to defendant would be minimal because the defendant's service was not yet operational and had not begun to enroll subscribers. Yet, the defendant would incur injury, according to the court, because Cybergold had expended considerable effort and money in soliciting companies and businesses to advertise on its service. In doing balance of hardship evaluations, the court could only consider the harm that would be caused by defendant's conduct that would constitute a violation of the Lanham Act. Thus, the likelihood of confusion that existed due to the similarity of the two markets had to be considered and that required an evaluation of the second consideration, probability of success on the merits.

To show probability of success on the merits, the second consideration, plaintiff had to prove that the defendant's use of a name created a likelihood of confusion, deception, or mistake among an appreciable number of ordinary buyers as to the source of or association between the two names. In its analysis, the court first classified the Goldmail mark as suggestive and hence eligible for trademark protection without requiring any proof of secondary meaning. Next, in considering the similarity between the two marks, the court determined the two marks similar in their suggestive meaning but otherwise there was limited similarity. Third, the court determined that because both plaintiff and defendant would be in direct competition, there was a close competitive proximity which increased the opportunity for confusion by consumers. Fourth, there was no evidence of defendant's intent to create confusion between the two products. Fifth, plaintiff did not provide any admissible evidence of actual confusion and it was unlikely any could assist because both plaintiff and defendant were new to the public. Lastly, in considering the degree of care reasonably expected of plaintiff's potential ordinary customers, the court said that these customers could or would subscribe to the two Internet services free of any cost to them and thus the degree of care would be minimal and the possibility of potential confusion high as a result. Considering these six elements, the court decided that plaintiff had not shown that defendant's use of the Cybergold mark had created a likelihood of confusion, deception, or mistake among an appreciable number of ordinary buyers as to the source or association of the Internet services of the two parties.

Regarding the third consideration in deciding upon a preliminary injunction, threat of irreparable harm, the court said that it could presume that irreparable injury would occur absent an injunction if the court found a probable success in proving likelihood of confusion. In this case, the plaintiff did not show a probability of success on the merits as needed for factor two and, as a result, irreparable harm was not shown either.

The fourth consideration, whether the public interest would be furthered by granting plaintiff a preliminary injunction in a Lanham Act case, required the court evaluate the consumer's right not to be confused as to the origin of goods and the public's interest in the ability to obtain the lowest priced goods. The court decided that the public interest would be furthered by competition between plaintiff and defendant and that the likelihood of confusion among ordinary consumers was minimal. Thus, the plaintiff's motion for a preliminary injunction was denied.

## WIRELESS ISSUES

### *BellSouth Mobility, Inc. v. Gwinnett County, Georgia*
944 F. Supp. 923 (N.D. Ga. 1996)

*Issue:*

Whether a local government can preempt a specific provision under the Telecommunications Act of 1996 by denying an application for a personal wireless service facility without supporting its decision in writing and with substantial evidence contained in a written record.

*Holding:*

A local government cannot deny an application for a personal wireless service facility unless its decision is in writing and supported by substantial evidence.

*Discussion:*

The local board of commissioners for Gwinnett County voted to deny BellSouth's application for a tall structure permit without any type of written explanation. The Telecommunications Act of 1996 states that any decision by a State or local government to deny a request to place a personal wireless facility "shall be in writing and supported by substantial evidence contained in a written record." "Substantial evidence" is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

The court also held that the Telecomm Act vests the court with sufficient authority to grant mandamus relief if the circumstances warrant it. Thus, the court decided that it did not have to remand the case back to the local government, but could itself decide whether the plaintiffs complied with all of the objective conditions and prerequisites set out in Gwinnett County's code.

### *Cellular One v. Council of Township of Hampton*
686 A.2d 905 (Pa.Cmwlth. 1996)

*Issue:*

Whether Cellular One is a public utility under the town law and, if so, whether it met the primary criteria for a conditional use permit to enable Cellular One to construct equipment for providing cellular telephone service.

*Holding:*

The town could not deny Cellular One a conditional use permit because the cellular provider met the town's definition of a public utility and fulfilled the primary criteria for conditional use.

*Discussion:*

Cellular One, a cellular telephone service provider, applied to the Township of Hampton for conditional use approval to construct a 150-foot steel telephone pole and equipment shelter on property owned by Cellular One. An ordinance of Hampton permitted such equipment as the pole and shelter as conditional use by the zoning arrangement provided for that district if Cellular One could be deemed a public utility. Hampton's code defined a public utility as a "service distributing water, gas, electricity, etc., or collecting sewage by means of a network of overhead or underground lines and requiring at various locations to maintain efficiency of the system pumping, regulating, transformer, switching, and other devices." Hampton argued that Cellular One was not a public utility because there is no network of overhead or underground lines with cellular phone service. The court held that although the ordinance does not specifically include a cellular telephone company, the use of the word "etc." reveals the drafters' intent to include uses not specifically enumerated. The court further stated that Cellular One does in fact utilize overhead or underground lines.

Pennsylvania law defined conditional use as a use "which the governing authority has determined is not adverse in and of itself to the public interest." Hampton argued that Cellular One does not meet this requirement because it endangers public health and safety and is not in general conformity and harmony with the area. The court held that there is no substantial evidence as to the effects of exposure to radio-frequency "radiation." It goes on to state that the Township raises health concerns despite the fact that it currently leased property to Cellular One's competitor, Bell Atlantic Mobile Systems. The court also held that aesthetics alone has never served as a reason to deny a property owner the legal use of his land.

***Cellular One v. Walworth County***
556 N.W. 2d 107 (Wis.App. 1996)

*Issue:*

Whether, under the Telecomm Act, the county acted in a discriminatory manner in denying Cellular One's application for a conditional use permit to construct a telecommunications tower.

*Holding:*

The court remanded Cellular One's application to the county board for consideration in a nondiscriminatory manner of evidence that Cellular One is similarly situated to previously approved applicants.

*Discussion:*

Cellular One applied for a conditional use permit to construct a 200-foot telecommunications tower in Walworth County. Local residents opposed the tower, arguing that the tower's electromagnetic emissions might create health hazards, the tower depreciated the value of the surrounding property, and the tower caused negative aesthetics to the surrounding scenic farmland. The county denied Cellular One's application based on the reasoning that the tower would reduce the value of the neighbor's property.

Cellular One sought certiorari review of the county's decision in circuit court, requesting that the court enlarge the record and consider evidence that the county had previously approved similarly situated towers to prove that the county had acted in a discriminatory manner. The circuit court refused to supplement the record, ruling that it did not have such authority and that the record was sufficient to support a decision to deny the application.

A provision of the Telecomm Act prohibits authorities from using the zoning process to unreasonably discriminate against competing service providers. The court stated that the fact that the county had previously approved similarly situated towers is material to the open competition issues that are emphasized in the Telecomm Act. It reasoned that Cellular One's concerns about nondiscriminatory placement of the towers might balance against the county's concerns about declining property values. The court remanded the case and directed the county to examine the record de novo such that Cellular One could introduce its evidence regarding other tower approvals.

***Sprint Spectrum, L.P. v. City of Medina***
924 F. Supp. 1036 (W.D. Wash. 1996)

*Issue:*

Whether a city's placement of a six-month moratorium on the issuance of new permits for wireless communications facilities violates § 704 of the Telecommunications Act of 1996.

*Holding:*

A six-month moratorium on the issuance of new permits for wireless communications facilities does not, without more, violate § 704 of the Telecomm Act.

*Discussion:*

Sprint Spectrum, which sought to provide wireless personal communications services in the city of Medina, Washington, challenged a city's six-month moratorium on the issuance of new permits for the placement of antennas and other wireless communications facilities. The moratorium did not affect the processing of applications. The court rejected three arguments put forth by Sprint Spectrum that the city's action violated section 704 of the Telecommunications Act and rejected its motion for a preliminary injunction.

First, the court concluded that the city did not violate § 704(a)(7)(B)(i)(II), which provides that local governments may not pass regulations which have the effect of prohibiting for the provision of wireless communications services. The court reasoned that because the moratorium did not affect the processing of permits, but only resulted in short-term suspensions, it did not violate the Telecommunications Act. Second, the city did not violate § 704(a)(7)(B)(ii), which requires local governments to act on permit applications within a reasonable period of time. Because the city enacted the measure for the purpose of determining whether such towers were needed and whether they affected the health of residents, the city acted consistent with the reasonableness requirement of the Telecomm Act. Finally, the court concluded that the ordinance did not "unreasonably discriminate among providers" of similar services for the purposes of § 704(a)(7)(B)(i)(II). The court found that the moratorium was not discriminatory because it applied to all service providers.